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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 755

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,
Appellants,

vs.

WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK; FRANK HOGAN, AS DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

EMIL K. ELLER,
JULIUS HALLENBECK,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,

Plaintiffs,

against

WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, A MUNICIPAL CORPORATION; FRANK HOGAN, AS DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants.

This is an action brought for a declaratory judgment and for an injunction. Plaintiffs sought a declaration that the amendment to Article 1, Section 12 of the Constitution of the State of New York, and Section 813-A of the Code of Criminal Procedure of the State of New York providing, inter alia, for the issuance by judicial officers of the State of New York of ex parte orders for the interception of telegraphic or telephonic communications, are invalid and in violation of Section 605, Title 47, U. S. C. A., 48 Stat. 1103, June 19, 1934, c. 652.

Plaintiffs also sought an injunction enjoining the issuance of the ex parte orders by judicial officers under the authority of the aforesaid State constitutional provision and section of the Code of Criminal Procedure, as well as the enjoinment of any interception and divulgence of tele-

graphic and telephonic communications by the defendants as interdicted by said Radio Communications Act of 1934.

The defendants moved separately to dismiss the complaint on the ground that the Court lacked jurisdiction over the subject matter of the case, claiming:

1. That the complaint failed to show that the plaintiffs had been deprived of any right secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

2. The complaint failed to present an actual controversy within the jurisdiction of this Court.

The motions to dismiss came on for a hearing before Hon. Sylvester J. Ryan. By an order dated October 19, 1949 Chief Judge Learned Hand of the United States Court of Appeals designated the Hon. Edward A. Conger and the Hon. Sylvester J. Ryan, judges of the United States District Court for the Southern District of New York and himself, the Chief Judge of the United States Court of Appeals for the Second Circuit to serve as members of a special statutory court under Section 2284 of the Judicial Code, 28 U.S.C.A. to hear and determine the action. (Copy of order annexed)

The defendants at this time moved separately to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted because:

1. It presented no actual controversy.

2. It failed to state a cause of action.

3. The Court lacked jurisdiction over the subject matter.

A hearing on the motions was held before the specially convened statutory court. The Court granted the motions to dismiss for lack of jurisdiction, without costs. The Court

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rendered an opinion and entered a final decree in judgment on December 7th, 1949. (Copy of the opinion and decree are attached hereto.)

a) **The Statutory Provisions Sustaining Jurisdiction**

Section 1253, Judicial Code, Title 28, U.S.C.A., 62 Stat. 926, June 25, 1948, c. 646, provides as follows:

> "Direct appeals from decisions of three-judge courts.
>
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Section 2281 Judicial Code, Title 28, U.S.C.A., 62 Stat. H.R. 3214, June 25, 1948, c. 646, provides as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Section 2201 Judicial Code, Title 28, U.S.C.A., as amended May 24, 1949, c. 139, Section 111, 63 Stat. 105, provides as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration,

whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Section 1343, subdivision 3, Title 28, U.S.C.A., 62 Stat. H.R. 3214, June 25, 1948, c. 646 (formerly Section 41, subd. 14) provides in part as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Title 8, Section 43, U.S.C.A., R.S. Section 1979, provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

See: *Bowers* v. *Calkins*, 84 F. Supp. 272 District Court D. New Hampshire;
International Longshoremen's & Warehousemen's Union, et al. v. *Ackerman et al.*, 82 F. Supp. 65;
Mosher v. *City of Phoenix*, 287 U. S. 29, 30;
Iselin v. *LaCoste*, 147 F. 2d 791, 793;

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Maryland Casualty Co. v. *Hubbard*, 22 F. Supp. 697, 700;
Southern Pac. Co. v. *Conway*, 115 F. 2d 746, 749;
Gordon v. *Bowles*, 153 F. 2d 614.

b) Statutes of State of New York, the Validity of Which Is Involved

Section 813a of the New York Code of Criminal Procedure appearing in Laws of New York 1942, c. 924, effective May 23, 1942, provides as follows:

> "An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments

described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same."

Article I Section 12 of the Constitution of the State of New York, adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938, provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraphic communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

c) **The Date of Judgment and Date of Filing of Notice of Appeal**

The final judgment herein was entered on December 7th, 1949.

The petition for leave to appeal was presented on the 2nd day of February, 1950.

d) **The Grounds upon Which It Is Contended That the Questions Involved Are Substantial**

The substantial Federal question involved is:

Does the New York State Constitution (Article I Section 12) and its criminal code (Section 813a), which permits

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wire-tapping by State officers, pursuant to leave obtained through ex parte orders, violate Section 605 of the Federal Communications Act, which forbids the interception and divulgence of telephone and telegraphic communications by any person, and do such acts constitute an illegal assertion and use of power by the State of New York and an invasion by the state of a field fully and exclusively occupied by the Congress of the United States?

Plaintiffs contend that:

1. Section 605 of the Federal Communications Act does not merely announce a prohibitory rule of evidence governing the admission of evidence in our Federal Courts, but that it makes wire-tapping and the divulgence of any information obtained thereby, a crime, whether such wire-tapping and divulgence is performed by a Federal officer, State officer or merely a private citizen. In other words, the Congressional interdiction against wire-tapping and the divulgence of information obtained thereby, announced a substantive rule of law affecting each and every one of our citizens, irrespective of their public or private status.

United States v. *Gruber*, 39 F. Supp. 291, 293, aff'd. 123 F. 2d 307;
Weis v. *United States of America*, 308 U. S. 321;
Reitmeister v. *Reitmeister*, 162 F. 2d 691.

2. Congress by express legislation intended to and did occupy the entire field of communication themselves, including that of the telephone and telegraph, as an exclusive exercise of its "commerce powers," by the enactment of the Federal Communications Act, and more particularly, Section 605. Such Federal legislation governs and is supreme over any State legislation in the same field. The State Statute and the Constitutional provision involved are therefore invalid in that they represent an illegal invasion by the State of New York into a field fully and exclusively occupied by the United States Congress.

Allen H. Dumont Laboratories, Inc. v. *Carroll*, 86 F. Supp. 813;
Barton v. *United States*, 75 F. Supp. 703.

3. The New York State Statute and the Constitutional provision deprived citizens of the State of New York and of the several States of the right of privacy and other rights, privileges or immunities secured by the Constitution and the Laws of the Federal Government.

4. Plaintiffs were proper parties to this action and had the right to bring the same.

Dated: New York, N. Y., January 31st, 1950.

EMIL K. ELLIS and
JULIUS HALLHEIMER,
Attorneys for Plaintiffs.

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APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil No. 50-393

HERMAN HOFFMAN and NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION, *Plaintiffs*,

against

WILLIAM P. O'BRIEN, as Police Commissioner of the City of New York, a Municipal Corporation; FRANK HOGAN, as District Attorney for the County of New York, State of New York, and NATHANIEL L. GOLDSTEIN, as Attorney General of the State of New York, *Defendants*.

OPINION OF THE COURT

RYAN, *D.J.*

This action is brought for a declaratory judgment and for an injunction. 28 USCA 2201.

Plaintiff, Herman Hoffman, is a citizen and resident of the City and State of New York and president of plaintiff, New York County Criminal Courts Bar Association, incorporated under the laws of the State of New York.

Defendant, William P. O'Brien, is the Police Commissioner of the City of New York and in this capacity is charged with the supervision and direction of the members of the Police Department of the City. Defendant, Frank Hogan, is the District Attorney of the County of New York, New York City. It is his duty to investigate and prosecute all crimes committed in violation of state law within the County. Defendant, Nathaniel L. Goldstein, is the Attorney-General for the State of New York and the chief law enforcement officer of the State.

The complaint seeks a judgment declaring invalid and in violation of Section 605 of the Federal Communications Act (47 USCA 605), the following: (1) the provisions of Article 1, Section 12 of the Constitution of the State of

New York, which authorize telephone and telegraph interceptions by state law enforcement officers, through the issuance of warrants or ex parte court orders; (2) Section 813-a of the New York Code of Criminal Procedure, which defines the procedural steps which state officers are required to follow in order to obtain such judicial permission to intercept; (3) all orders made by judicial officers of the State of New York pursuant to said state statutory and constitutional provisions; and (4) interceptions and divulgences by defendants. The complaint also seeks a permanent injunction restraining the issuance of orders by judicial officers of the State of New York, permitting interceptions, and enjoining interceptions and divulgences of such communications by defendants.

These constitutional and statutory provisions of the State of New York authorize telephone and telegraph interceptions by state law enforcement officers under a system of judicial supervision through the issuance of warrants and ex parte orders. (N. Y. Constitution, Art. 1, Sec. 12; N.Y.C.C.P. Sec. 813-a). Applications for interception orders may be made only by the attorney general, a district attorney or a police officer having rank above that of sergeant. Such applications must be on oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained. They may be made only to a judge of the Court of General Sessions, a County Court or the New York Supreme Court. All these courts have superior criminal jurisdiction and jurisdiction of the prosecution and trial of felonies. In the case of telephones, the actual line to be intercepted, the person or persons using it and the purpose of the interception must be particularly described. It is further provided that the judge to whom application is made may examine witnesses under oath, and shall issue the order only when satisfied that there is reasonable ground for the belief that evidence of the commission of crime can be obtained.

Section 605, 47 USCA, *Federal Communications Act of 1934* provides in part that,

> "No person not being authorized by the sender, shall intercept any communication and divulge or

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publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Defendants separately and simultaneously move for an order under Rule 12(b) dismissing the complaint on the ground that (1) it fails to show that plaintiffs have been deprived of any right secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States, and (2) there is not present a justiciable controversy within the jurisdiction of the court.

The real claim asserted is that Article 1, Section 12 of the State Constitution and Section 813-a, C.C.P., violate the civil rights of plaintiffs because they "constitute a deprivation of the rights, privileges and immunities secured to its citizens by the Constitution and laws of the United States." This is so, plaintiffs allege because interceptions and divulgences made pursuant to these statutory and constitutional provisions "constitute a violation of U.S.C.A., Section 605, Title 47 of the Laws of the United States aforesaid, that U.S.C.A. Section 605, Title 47 of the Laws of the United States was intended by Congress as a declaration of public policy affecting fundamental human liberties of citizens of the United States, which is binding upon the State and its public officers. . . ." (par. 10, complaint)

The complaint alleges further that defendants acting in their official capacity have applied for and obtained ex parte orders from judicial officers of the State of New York, permitting the interception and divulgence of telegraphic and telephonic communications of citizens of the State and of the United States; that many of such orders are now in effect and that defendants, under such orders, have been and are still engaged in the interception and divulgence of interstate and intrastate telegraphic and telephonic communications. (par. 7, complaint)

It then alleges:

"That, pursuant to the said orders, interceptions and divulgences of interstate and intrastate tele-

graphic or telephonic communications are widespread within the City and State of New York; that upon information and belief, the said communications of many citizens of the United States and residents of the City and State of New York including the plaintiffs have been and are being intercepted and divulged." (par. 8, comp.)

"That the said interceptions and divulgences under the said orders affect many public telephones in the City and State of New York widely used by its residents, including the plaintiffs, as well as many private telephones belonging to or used by its residents; that an endless chain of interceptions and divulgences is thereby created affecting citizens and residents who are in no way involved in the commission of crimes or offenses but whose communications are intercepted and divulged on the mere speculation that information may be thereby obtained which might in turn lead to information desired in connection with the detection or punishment of crime." (par. 9, comp.)

"• • • That this court has jurisdiction of the subject matter of this action without any requirement for diversity of citizenship and without any requirement as to amount in controversy; that the matters in controversy herein relating solely to the protection of the rights and privileges of citizens of this country under the Constitution of the United States and the appropriate statutes hereinafter referred to." (par. 3, comp.)

And, further

"That plaintiffs have no adequate remedy at law and therefore bring this proceeding for redress of the aforesaid injuries pursuant to the statutes of the United States providing therefor including U.S.C.A., Section 43, Title 8 of the Laws of the United States." (par. 12, comp.)

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The complaint is predicated on Section 43, *supra*, which provides that,

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

Section 1343(3), 28 USCA (formerly Sec. 41(14)) gives the District Court jurisdiction of all suits

> "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The motions must be granted and the complaint dismissed, for the complaint fails to allege facts with sufficient definiteness to show that plaintiffs have been deprived of any rights, privileges, or immunities secured by the Constitution and the laws of the United States. In short, it fails to allege an actual or justiciable controversy and therefore does not state a claim for declaratory relief. The complaint contains no allegation that plaintiffs' telephones have been in the past, or are now, the subject of an order allowing interception and divulgence of conversations carried on over them. There is no allegation that such action is either threatened or impending. It does not even appear that either plaintiff is, or has been, a subscriber to telephone service. The same is true of telegraphic communications sent by or to plaintiffs.

The allegations are pregnant with double entendre. One may read them as alleging that plaintiffs' telephone conversations run the risk of being "tapped" or intercepted, like

those of "the many citizens of the United States and residents of the City and State of New York,"—since plaintiffs as residents of the City of New York are members of the general group mentioned—only because of "an endless chain of interceptions and divulgences;" or, one may, by rhetorical dissection, come to the conclusion that it is intended to allege that plaintiffs' conversations are actually being intercepted and divulged. The latter, however, is not alleged with particularity.

The only possible interference with plaintiffs' telephone conversations alleged is such as might arise from the many ex parte orders of judicial officers (par. 7), and, from such orders as "affect many public telephones in the City and State of New York." (par. 9). The complaint fails to allege any facts showing real, present and actual personal injury to plaintiffs or distinguishing their situation from that of "people generally." *Massachusetts* v. *Mellon,* 262 U. S. 447, 488.

The only allegations to show that plaintiffs have been, or will be, affected by any order issued or to be issued under the state statute, are in the eighth and ninth paragraphs of the complaint. In the eighth, the complaint alleges that "the communications of many . . . residents of the City . . . of New York, including the plaintiffs, have been and are being intercepted and divulged." In the ninth, the complaint alleges that "interceptions and divulgences under said orders affect many public telephones in the City . . . of New York widely used by its residents, including plaintiffs." It is apparent that all this means no more than that when the plaintiffs go to a public telephone they run the chance that the wire may be "tapped;" literally, perhaps, the words mean that their wires have been "tapped," but that is not important since the complaint only demands future relief. They have no greater interest in the matter than any other citizen; they do not allege that they have been singled out, or are likely to be.

Such allegations are not sufficient to merit consideration of the constitutional questions which they purport to raise and do not present to the court "matters appropriate for judicial determination." *United Public Workers* v. *Mitchell,*

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330 U. S. 75, 91; *Mass. State Grange* v. *Benton*, 272 U. S. 525.

It would be an abuse of discretion to grant the declaratory judgment on the facts alleged, for "it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Federation of Labor* v. *McAdory*, 325 U. S. 450, 471; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293. The complaint here does not permit the exercise of discretion, for without a clear and unequivocal allegation that plaintiffs' civil rights are being invaded by a court order obtained under the provisions challenged, plaintiffs have no standing to maintain this action. *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, aff'd 334 U. S. 854.

With the restrictions placed around the granting of orders of interceptions, it appears that even if plaintiffs' telephonic and telegraphic communications have, in fact, been intercepted and divulged, this was occasioned either by the fact that plaintiffs were using a telephone line concerning which there had been a judicial finding, (ex parte, it is true, but based on sworn proof), that there was probable cause to believe that it was being used as an instrument of crime in the commission of crime, or that plaintiffs were in communication with an individual of whom such finding had been made. It is the alleged invasion of plaintiffs' civil rights pertaining to the privacy and secrecy of communications of this character which constitutes the sole ground alleged for jurisdiction of this court.

The complaint will be dismissed for lack of jurisdiction, without costs.

Dated, New York, N. Y., December 6th, 1949.

LEARNED HAND,
Circuit Judge.

EDWARD A. CONGER,
District Judge.

SYLVESTER J. RYAN,
District Judge.